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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1949

No. 731

CURLEY C. HOFFPAUIR,
Petitioner,

versus

HARRY M. HOXSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1949

CURLEY C. HOFFPAUIR,
Petitioner,

versus

HARRY M. HOXSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Curley C. Hoffpauir, respectfully shows:

A

Summary Statement of the Matters Involved.

This action was filed November 30, 1948 in the District Court of the United States for the Northern District of Texas, Dallas Division, to recover the sum of $5,364.99 for professional legal services (R. 7-15). See *Curley C. Hoffpauir* v. *Harry M. Hoxsey,* 82 F. Supp. 14. Federal jurisdiction was predicated upon diversity of citizenship of the parties and the amount involved. The first cause of action was based on the reasonable value and agreed amount of such services; the second cause of action pleaded an account stated and an order dated November

16, 1948 made by the District Court in the Southern District of New York, fixing the value of petitioner's services and the amounts of his attorney's liens, in accordance with the law of New York, in the then pending action in that Court of *Harry M. Hoxsey, plaintiff, against The Newspaper PM, Inc. and Albert Deutsch, defendants,* Civil No. 42-706 (R. 9-15).

The unverified answer denied the first count and pleaded lack of jurisdiction of the New York Court over the respondent's person and, therefore, without jurisdiction to determine the value of petitioner's services and to fix the amounts of his liens because of the fact that notice of such proceeding was served by registered mail upon respondent in Texas and not within the Court's jurisdiction in New York (R. 24-28), *but failed to deny or plead* (R. 27, 28) *to paragraphs seventh and eighth of the complaint, which allege the sending of the statements of account and the account stated* (R. 9). Hoxsey, however, acknowledged the receipt of notice of the proceedings by his attorney in his New York action (R. 14, 149).

Petitioner made a motion for summary judgment (R. 29 to 113) based on the New York District Court's order dated November 16, 1948. The motion was denied, without prejudice (R. 113).

The trial was before the Court on February 8, 1949. Petitioner introduced in evidence a certified copy of the order of November 16, 1948 and rested his case. No other evidence was introduced in support of the complaint, *except the admission on the record of the account stated* (R. 9, 27, 28, 113, 114, 117).

The respondent testified in his own defense and admitted employing petitioner as his attorney to file the action in the District Court in New York against The Newspaper PM, Inc. and Albert Deutsch, for the sum of

$1,000,000, but denied that he had employed petitioner in other matters (R. 139).

The trial court said, in part (*Hoffpauir* v. *Hoxsey,* 82 F. Supp. 14. NOTE: Petitioner does not know why the court's official opinion was not included in the record by the Clerk of the District Court):

"The plaintiff contends that he was employed by the defendant * * * That certain services were performed by the plaintiff and the agreement for compensation was made at conferences in New York and by remittances from Dallas, Texas. *That later the plaintiff in that suit (New York suit) concluded to dismiss it.* That his attorney, thereupon, sent him a bill for the alleged balance of the attorney's fees (R. 44-47); that bill was not paid, and in October, 1948, a registered notice was sent to this defendant that a motion had been made in that case, invoking a New York statute, Judiciary Law, Consol. Laws, c. 30, Sec. 475, which gave the attorney a lien upon such property and papers as he had in his possession, with the right to have the court there to fix the amount of the fee. This notice was sent by registered mail and was received by this defendant.

"At the hearing in New York on that motion, a judgment for $5,364.99 was rendered for the attorney against his client, the defendant here, with a lien upon such property as the attorney had in his possession. See Federal Rules of Civil Procedure, rule 5(b), 28 U. S. C. A.

"The defendant poses that an attorney's retaining lien cannot be actively enforced, Rose *v.* Whiteman, 52 Misc. 210, 101 N. Y. S. 1024; Lazenby *v.* Codman, 2 Cir. 116 F. 2d 607, and a charging lien, if nothing is recovered, or, if there is no cause of action, there is nothing to which the lien can attach, Kipp *v.* Rapp, 7 N. Y. Civ. Proc. 385. He also calls attention to the ancient case of

Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565. Neither of these cases rules the case at bar. The expression in Pennoyer *v.* Neff to the effect that the judgment in rem binds every one, but the establishing facts on which it proceeds, is not equivalent to a judgment in rem. * * *

"The difference between the parties in the case at bar does not arise over the question of employment, that is conceded, nor the institution of the suit in New York, nor that the defendant asked for a dismissal of the suit after having paid a part of the fee to his attorney, but over the amount that he owed such attorney; the attorney claiming a much larger amount.

"The effort to secure further payments on that fee after the defendant had asked for a dismissal of his suit, resulted in an order, heretofore referred to, issued out of the New York court which was served upon the defendant and to which he made no response, nor objection, nor defense. *The New York Court thereupon heard testimony in accordance with the notice and motion and determined the amount due and fixed the lien.*

"*Such a procedure is in accordance with the laws of New York and what was done binds this court.* In re Paschal, 10 Wall. 483, 495, 19 L. Ed. 992; Central Railroad & Banking Co. *v.* Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915; Lazenby *v.* Codman, 2 Cir. 116 F. 2d 607; In re Baxter & Co., 2 Cir. 154 F. 22; American Exp. Co. *v.* Mullins, 212 U. S. 311, 29 S. Ct. 381; 53 L. Ed. 525, 15 Ann. Cas. 536; Baltimore S. S. Co. *v.* Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; Pagano *v.* Arnstein, 292 N. Y. 326, 55 N. E. 2d 181; Commercial Casualty Ins. Co. *v.* Consolidated Stone Co., 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252; Robinson *v.* Rogers, 237 N. Y. 467, 143 N. E. 647, 33 A. L. R. 1291; Leviten *v.* Sandbank, 291 N. Y. 352, 52 N. E. 2d 898; Gates *v.* Preston, 41 N. Y.

113; Goebel *v.* Iffla, 111 N. Y. 170, 18 N. E. 649; Roulstone *v.* Oesterreicher, 188 Misc. 741, 66 N. Y. S. 2d 244.

"Judgment must go for the plaintiff in the sum of $5,364.99." (Italics and Record references ours.)

The principal contentions of the respondent on appeal were (1) that he had not been personally served within the jurisdiction of the court in New York, and (2) that the order of November 16, 1948 (R. 12-15) was a judgment *in rem* which could have no binding effect upon him in an action *in personam* in Texas.

The Court of Appeals reversed the judgment and ordered a new trial on the first count.

B

Reasons Relied on for the Allowance of Writ of Certiorari.

Your petitioner alleges that the decision of the United States Court of Appeals for the Fifth Circuit, dated February 16, 1950, in the cause of *Harry M. Hoxsey, Appellant,* v. *Curley C. Hoffpauir, Appellee,* No. 12733, reversing the judgment for $5,364.99 in favor of petitioner, is erroneous, without legal justification, and contrary to the rules, decisions and principles of law applicable to such cases. The grounds upon which this Court is asked to review the judgment of the United States Court of Appeals for the Fifth Circuit are:

I. Because the Court of Appeals has failed and refused to give full faith and credit to the judicial proceedings of the State of New York; that is, to the final order or decree of the District Court of the United States for the Southern District of New York, a federal court of general jurisdiction, and which jurisdiction in the instant

case was invoked by respondent for his own purposes and predicated upon the diversity of citizenship of the parties.

Michigan Trust Co. v. *Ferry,* 228 U. S. 346;
Leman v. *Krentler-Arnold Co.,* 284 U. S. 448;
Merchants Heat & Light Co. v. *Clow & Sons,* 204 U. S. 286, 289, 290;
American Express Co. v. *Mullins,* 212 U. S. 311, 313;
Boone v. *Wachovia Bank & Trust Co.,* 163 F. 2d 809;
Leviten v. *Sandbank,* 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher,* 188 Misc. 741, 742;
Citizens Bank of White Plains, N. Y. v. *Oglesby,* 270 App. Div. 136;
Smith v. *Young,* 192 Misc. 897;
Fauntleroy v. *Lum,* 210 U. S. 230;
Forsyth v. *Hammond,* 166 U. S. 506, 514;
Jos. Riedel Glass Works, Inc. v. *Keegan,* 43 F. Supp. 153;
Caterpillar Tractor Co. v. *International Harvester Co.,* 120 F. 2d 82;
Davis v. *Davis,* 305 U. S. 33;
Stole v. *Gottlieb,* 305 U. S. 165;
Treinies v. *Sunshine Mining Co.,* 308 U. S. 66;
Williams, et al. v. *North Carolina,* 317 U. S. 287, 293, 294;
Hampton v. *M'Connel,* 3 Wheat. 234, 235.

The Court of Appeals, however, recognized the jurisdiction of the District Court in New York over respondent's person and its right and power to fix the amounts of his attorney's liens:

> "We have no doubt that under the well established rule that one who subjects himself to the

jurisdiction of a Court, even where he would not otherwise be subject to suit, becomes subject to any valid claim asserted against him directly relating to the subject matter of his voluntarily initiated proceeding. We do not doubt therefore that by his employment of counsel and the institution of suit in the Court in New York the appellant became subject to the statutes of New York regulating and controlling the attorney-client relationship with reference to the fixing and enforcing of the respective rights between the parties.

"It is the general rule that while the Federal law provides no such remedy, Federal Courts sitting in a State enforce that State's statutes creating attorney's liens. Webster *v.* Sweat, 5 Cir., 65 F. 2d 109; Brooks *v.* Mandel-Witte Co., 54 F. 2d 992, 994, and citations."

But held:

"It results therefore that the legal effect of the order of the United States District Court for the Southern District of New York was the imposition of a lien upon papers and effects which the attorney had in his possession, and only upon any recovery which might be obtained in the litigation, which afforded the jurisdiction to declare the lien. In other words, it was an award *in rem,* enforceable only as against the papers or property in possession of the attorney and any recovery or receipts resulting from the litigation. In the light of the applicable legal principles, we do not construe the order as even attempting to bind the appellant *in personam,* so as to establish a fixed liability, the correctness of which he is not permitted to challenge when proceeded against in Texas by a suit seeking a personal judgment. We consider the result reached in the present suit to be the equivalent of the enforcement *in personam* of a decree *in rem,* rendered in a suit where there has been no

personal service upon the defendant, and only the attachment or sequestration of his property. This can not be done. Pennoyer *v.* Neft, 95 U. S. 715; McQuillen *v.* Dillon, 98 F. 2d 726; Cooper *v.* Reynolds, 77 U. S. 308; Graber *v.* Killits, 282 F. 185.

"In the Texas suit the burden was upon the complainant to establish his right to recover independently of the New York proceeding. For this reason, it was error for the trial Court to give conclusive effect to the order of the New York Court instead of requiring the complainant to establish his case by competent evidence. The judgment is reversed and a new trial ordered on count one of the complaint."

The Court of Appeals in its holding completely ignores the well established rule that once a court acquires jurisdiction (in this case invoked by Hoxsey's own affirmative act) that jurisdiction continues over the person even where a party subsequently leaves the State; that after service of original process that all subsequent notices and papers may be served by mail or personally even outside the court's territorial jurisdiction, in accordance with Rule 5(b), Federal Rules of Civil Procedure.

Leman v. *Krentler-Arnold Co.*, 284 U. S. 448;
Michigan Trust Co. v. *Ferry*, 228 U. S. 346;
Jos. Riedel Glass Works, Inc. v. *Keegan*, 43 F. Supp. 153;
Tilghman v. *Tilghman*, 57 F. Supp. 417, 418;
Brooks v. *United States*, 119 F. 2d 636, 644;
Watkins v. *Rives*, 125 F. 2d 33, 40, 41.

The effect of the holding of the Court of Appeals is that, although the New York District Court had jurisdiction to fix petitioner's attorney's liens and the fixing of

the amount of petitioner's fees was a necessary element in the fixing of such liens, nevertheless, the determination as to the amount of such fees was not *res adjudicata* between the parties or binding on respondent Hoxsey in a later suit to recover the amount of the fees so fixed, whether such suit were brought in Texas or in New York or in any other State.

In other words, a determination necessarily made by a New York District Court having jurisdiction is not binding on the parties in a subsequent suit wherever instituted. The denial of such full faith and credit to the judicial proceedings of courts in the State of New York is due to errors of said Court of Appeals apparent from its opinion in this cause and committed, *inter alia,* in the following particulars:

(a) Said Court erred in holding that the amounts fixed and determined by the District Court in New York as the value of petitioner's legal services rendered to respondent Hoxsey could only be enforced by retaining possession of Mr. Hoxsey's property and papers and against the then pending action, thereby failing to recognize the force and binding effect of the New York statute, Section 475 of the Judiciary Law and the court decisions of the State of New York, which decisions are binding on the federal courts and hold that:

> "The remedies of an attorney to secure compensation from his client * * * are (1) suit to recover for his services; (2) the retaining lien; (3) the charging lien; (4) ascertainment and foreclosure of the lien in a separate equitable suit; (5) ascertainment and fixation of the lien in the action. All of these are not exclusive but cumulative remedies."
>
> *Citizens Bank of White Plains, N. Y.* v. *Oglesby,* 270 App. Div. 136, 140.

"An attorney's lien is to be admeasured by the value of his services."

Ward v. *Craig,* 87 N. Y. 550, 561.

"* * * once the value of attorney's services is determined in a proceeding to fix his lien, it will be conclusive upon the parties in any other subsequent proceeding or action."

Leviten v. *Sandbank,* 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher,* 188 Misc. 741, 742.

"* * * and the proceeding to determine and enforce the lien is ancillary to the main suit. * * * The statute expressly states that the proceeding may be instituted by petition, indicating clearly that it may be summary in character. * * *

"Is it necessary to make the plaintiff a party to the proceeding? That apparently is the practice of the lower New York courts, * * *; and although I have been unable to find any decision of the Court of Appeals bearing on the subject, I think that on the present facts the plaintiff should be brought in *on adequate notice,* * * *" (italics ours).

Judge Coxe in *Lawrence* v. *Commodore Nav. Corporation,* 27 F. Supp. 139, 140 (U. S. D. C., S. D. N. Y.).

(b) Said Court erred in holding that under the laws of New York the federal district court sitting in New York had no jurisdiction to bind respondent Hoxsey, *in personam* as to the amount of fees due his attorney for services rendered to Hoxsey on matters arising out of an action which respondent Hoxsey had instituted for his own purposes and benefit, which action was then pending in said federal district court—this holding being in direct conflict with the rule laid down in New York:

Leviten v. *Sandbank,* 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher,* 188 Misc. 741, 742.

(c) Said Court erred in not recognizing or giving force and effect to the Notice of Motion and petition and affidavits in support thereof served personally on respondent Hoxsey by registered mail, the receipt of which he acknowledged over his personal signature 14 days before the return date, and who was then before the District Court in New York as a voluntary party plaintiff in the action then pending before that Court, which Notice of Motion fixed the date for a hearing in said action for the purpose of determining and fixing the amount respondent Hoxsey was indebted to his attorney of record, the petitioner herein.

In re Rosser, 101 Fed. 562, 567;
In re Wood and Henderson, 210 U. S. 246, 254;
Michigan Trust Co. v. *Ferry,* 228 U. S. 346;
Leman v. *Krentler-Arnold Co.,* 284 U. S. 448;
Rule 5(b), Federal Rules of Civil Procedure;
Jos. Riedel Glass Works, Inc. v. *Keegan,* 43 F. Supp. 153;
Tilghman v. *Tilghman,* 57 F. Supp. 417, 418;
Brooks v. *United States,* 119 F. 2d 636, 644;
Watkins v. *Rives,* 125 F. 2d 33, 40, 41.

(d) Said Court erred in limiting by construction and interpretation the power and jurisdiction of the District Court in New York to determine, by its final order of November 16, 1948, the amount due from respondent Hoxsey to his attorney for professional legal services rendered.

Michigan Trust Co. v. *Ferry,* 228 U. S. 346;
American Express Co. v. *Mullins,* 212 U. S. 311, 313;
34 *Corpus Juris* 743;
Leman v. *Krentler-Arnold Co.,* 284 U. S. 448;

Fauntleroy v. *Lum,* 210 U. S. 230, 236;
Baltimore S. S. Co. v. *Phillips,* 274 U. S. 316, 325;
Schuylkill Fuel Corp. v. *Nieberg Realty Corp.,* 250 N. Y. 304;
Leviten v. *Sandbank,* 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher,* 188 Misc. 741, 742.

(e) Said Court erred in holding that the final order of November 16, 1948, made by the District Court in New York, "was an award in rem, enforceable only as against the papers or property in possession of the attorney" and that "it was error for the trial Court to give conclusive effect to the order of the New York Court instead of requiring the complainant to establish his case by competent evidence."

And, in consequence, said Court erred in holding that your petitioner was obliged to establish by proof *de novo* the amount and value of the professional legal services which he had rendered to respondent Hoxsey, notwithstanding the fact that this had already been done in the New York action to which respondent Hoxsey was a party and after adequate notice to him, which holding was equivalent to saying that the New York Court had no power to make the order of November 16, 1948, which specifically provided, in directing dismissal of the then pending action by stipulation of the attorneys, for the right of petitioner herein "to recover from Harry M. Hoxsey for professional services rendered to him in the amounts hereinabove determined and fixed," and which quoted direction was predicated upon the fact that respondent Hoxsey was before that Court *in personam* and, further, was in accordance with the laws of New York, by which the New York and Dallas U. S. District Courts, as well as the United States Court of Appeals for the Fifth Circuit, are bound.

(f) The said Court erred in not recognizing or giving force or effect to the "account stated" pleaded in the second cause of action, paragraphs seventh and eighth of the complaint (R. 9), which was admitted by respondent Hoxsey's failure to deny it in his answer (R. 9, 24-28, 100, 101).

Rodkinson v. *Haecker,* 248 N. Y. 480, 485.

(g) Said Court erred by holding that said judgment in petitioner's favor for $5,364.99 should be reversed and the case retried solely on the first cause of action, thereby ignoring the judicial proceedings of the Courts of New York, in violation of Section 1, Article IV of the Constitution of the United States, and depriving petitioner of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(h) Said Court erred in failing and refusing to give force and effect to the affirmative act of the respondent Harry M. Hoxsey, who invoked the jurisdiction of the New York Federal District Court, solely on the ground of diversity of citizenship, for his own purposes and benefit, thereby giving that Court power and jurisdiction over the person of Harry M. Hoxsey for the purpose of binding him by every subsequent order in the cause. When respondent Hoxsey brought the suit in the Federal District Court for the Southern District of New York he submitted himself to the jurisdiction of the Court with respect to all the issues embraced in the suit, including those pertaining to the rights of his attorney of record under the New York statutes and court decisions. The final order of November 16, 1948, which was made after due adequate personal notice to respondent Hoxsey, bound him personally as to the amount and value of his

attorney's services, and that order was binding on respondent Hoxsey, not simply within the State and Southern District of New York, but throughout the United States.

Leman v. *Krentler-Arnold Co.*, 284 U. S. 448, 451;
Michigan Trust Co. v. *Ferry*, 228 U. S. 346;
Merchants Heat & Light Co. v. *Clow & Sons*, 204 U. S. 826, 289, 290;
In re Baxter & Co., 154 Fed. 22;
Webster v. *Sweat*, 65 F. 2d 109;
Brooks v. *Mandel-Witte Co.*, 54 F. 2d 992, 994;
Nutt v. *Knut*, 200 U. S. 13.

(i) The said Court erred by denying on July 6, 1949 petitioner's motion to dismiss said appeal as being without any substantial merit and as being beyond the power of the Court to change or modify the order of the New York District Court and/or to affirm said judgment of the District Court of Texas, Dallas Division.

Robertson v. *Wilkinson*, 10 F. 2d 311;
Colorado Radio Corporation v. *Federal Communications Commission*, 118 F. 2d 24;
Brown v. *Carver*, 45 F. 2d 673;
National Surety Co. v. *Universal Transp. Co.*, 256 Fed. 450.

II. Because the Court of Appeals failed to construe a final order made by the District Court in New York in accordance with the statutes and decisions of New York, and the construction given is opposed to and conflicts with the decisions of the highest court of New York.

III. Because of the very great importance of this case to the parties and the amount involved therein.

IV. Because of the great importance of this case to the public and to attorneys all over the United States, in

that the judgment of the Court of Appeals for the Fifth Circuit, as it stands, gives immunity and unfair advantage to non-resident litigants who come into a State and avail themselves of the professional services of attorneys and then resort to dilatory tactics in an attempt to avoid payment of their just fees as determined by the conditions for practicing law in the particular locality and judgment and decisions of the courts thereof as to what is fair and reasonable compensation for the attorney so employed, and denies to the New York Court whose process and jurisdiction the litigant himself invoked for his own purposes and benefit the right to compel him to respond to it for a breach of the duty owed to one of its officers and to said Court.

V. Because the decision of the Court of Appeals, if suffered to remain unchanged, establishes rules of law in the matter of attorney's fees and liens in New York which are in direct conflict with the statutes and decisions of New York, but which, nevertheless, are controlling upon all federal courts in the Fifth Circuit, and authoritative in all other federal courts, including those sitting in New York, thus presenting to this Honorable Court a question of the highest public importance, worthy of its consideration and review in the public interest.

VI. Because said decision of the Court of Appeals is in direct conflict, not only with the decisions of the courts of New York, but with the decisions of this Honorable Court and other courts of the United States:

See cases cited under paragraph I, page 6.

VII. Because, as your petitioner is informed and believes, the judgment in this case is made final in the Court of Appeals, except for a retrial under erroneous and burdensome rules laid down by the Court of Appeals in its opinion, contrary to justice and the public interest,

as defined by the decisions of this Court, and except for the interposition by this Court as herein prayed.

The Court of Appeals, upon application in writing made by your petitioner on notice to the respondent, entered an order dated March 11, 1950 staying the mandate of that Court pending the disposition of this case by this Court.

WHEREFORE, in view of the premises aforesaid, your petitioner respectfully prays that this Court will grant its writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit commanding said Court to certify and send to it on a day to be designated a full and complete transcript of the record of the said Court of Appeals in the said cause therein pending, entitled: "Harry M. Hoxsey, Appellant, versus Curley C. Hoffpauir, Appellee, Number 12,733," to the end that said cause may be reviewed and determined by this Court, and that said judgment of the said Court of Appeals in said cause be reversed and that the judgment of the District Court of the United States for the Northern District of Texas, Dallas Division, be reinstated and affirmed by this Honorable Court, and that your petitioner have such other and further relief as the nature of the case may require and as to this Court may seem just and proper in the premises.

And will ever pray.

Dated, New York, New York, March 30, 1950.

CURLEY C. HOFFPAUIR,
Petitioner.

CURLEY C. HOFFPAUIR,
Attorney for Petitioner,
420 Lexington Avenue,
New York 17, New York.

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

CURLEY C. HOFFPAUIR,
Petitioner,

versus

HARRY M. HOXSEY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below.

The opinion of the Court of Appeals has not yet been officially reported, but it is dated February 16, 1950, and entitled: No. 12733—Harry M. Hoxsey, Appellant, versus Curley C. Hoffpauir, Appellee. The District Court's opinion is reported: Curley C. Hoffpauir, plaintiff v. Harry M. Hoxsey, defendant, 82 F. Supp. 14. (Court's oral opinion: R. 150).

II

Jurisdiction.

1. The date of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit to be re-

viewed is February 16, 1950: No. 12733, Harry M. Hoxsey v. Curley C. Hoffpauir—not reported (Last pages back of Record).

2. On August 11, 1947 the respondent Hoxsey voluntarily invoked the jurisdiction of the District Court of the United States for the Southern District of New York, by filing an action in that Court, as plaintiff, against The Newspaper PM, Inc. and Albert Deutsch, as defendant, to recover damages in the sum of $1,000,000, the jurisdiction of the Court being predicated solely on the amount involved and diversity of citizenship of the parties. Petitioner was employed as Hoxsey's attorney of record in that action (R. 62-81, 145). About April 22, 1948 the respondent informed petitioner that he had decided to drop this case and the other projects he had in New York. Petitioner sent respondent a final statement of account for $5,364.99 on April 26, 1948, together with a long letter (R. 44-47). On October 27, 1948 petitioner had delivered to respondent by registered mail a Notice of Motion, Petition, and Affidavits that he would apply to the District Court in New York on November 9, 1948 in Hoxsey's then pending action for an order determining the value of his services, fixing the amounts of his attorney's liens, and for relief from further acting as attorney for respondent (R. 60-103). Respondent did not answer or object to the motion. He did communicate direct with the attorneys for the defendants in that action, requesting dismissal of action and copies of certain papers on which petitioner had an attorney's lien (R. 108-113). On November 10, 1948, respondent requested petitioner by telegram to dismiss the action (R. 105). On November 16, 1948 the District Court in New York made a final order determining the value of petitioner's attorney's services and fixing his

liens at a total of $5,364.99 (R. 12-15). A certified copy of that order was served on respondent by registered mail on November 18, 1948; the action was dismissed by stipulation November 19, 1948 (R. 10, 11). November 30, 1948 petitioner filed an action against respondent in the Federal District Court at Dallas, Texas, and pleaded the order of November 16, 1948. At the trial on February 8, 1949 petitioner claimed that the order of November 16, 1948 was conclusively binding on the respondent as to the amount of petitioner's fees. The trial court so held. See Curley C. Hoffpauir, plaintiff v. Harry M. Hoxsey, defendant, 82 F. Supp. 14. On appeal by respondent, the Court of Appeals recognized the jurisdiction of the New York District Court to make the order of November 16, 1948, but denied that it had any binding effect on the respondent in an action *in personam,* and reversed the District Court judgment in petitioner's favor (R. 150-152, 153, 154, 159).

3. This Court has jurisdiction under Section 1254, U. S. C. A., Title 28, Article IV, Section 1 of the Constitution of the United States, and the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. The jurisdiction of this Court in the case at bar is sustained by the following cases:

Michigan Trust Co. v. *Ferry,* 228 U. S. 346;
American Express Co. v. *Mullins,* 212 U. S. 311, 313;
Forsyth v. *Hammond,* 166 U. S. 506, 514;
Leman v. *Krentler-Arnold Co.,* 284 U. S. 448;
Williams, et al. v. *North Carolina,* 317 U. S. 287.

In *American Express Co.* v. *Mullins, supra,* this Court said:

> "This court has jurisdiction because of the claim distinctly made in the Kentucky court that giving full faith and credit to the judgment of the Kansas court would prevent a recovery against the company, a claim which was expressly denied by the Kentucky court. Green *v.* Van Buskerk, 7 Wall. 139, 145; Hancock National Bank *v.* Farnum, 176 U. S. 640, 642; St. Louis, Iron Mountain & Southern Ry. Co. *v.* Taylor, 210 U. S. 281, 293."

Your petitioner distinctly made the following claim in the Court of Appeals and supported such claim with the citation of many authorities, including cases decided by this Court:

> "The District Court of the United States for the Southern District of New York had jurisdiction of the subject matter and of the parties. (Page 7, Appellee's Brief.)
>
> "The order made November 16, 1948 by the District Court of the United States for the Southern District of New York, is res adjudicata and is conclusively binding on the parties to this appeal." (Page 17, Appellee's Brief.)

The second part of this claim was expressly denied by the Court of Appeals. (See last page of opinion.)

In *Forsyth* v. *Hammond,* 166 U. S. 506, 514, this Court said:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the

statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise. • • •

In that same case, at pages 517, 518, and 519, this Court further said:

"The principles controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. *Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.* Cromwell *v.* Sac County, 94 U. S. 351; Lumber Co. *v.* Buchtel, 101 U. S. 638; Stout v. Lye, 103 U. S. 66; Nesbit *v.* Riverside Independent District, 144 U. S. 610; Johnson Co. *v.* Wharton, 152 U. S. 252; Last Chance Mining Co. *v.* Tyler Mining Co., 157 U. S. 683. • • •

"The construction by the courts of a State of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a State has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgment. *That court is the final arbiter as to such questions.*" (Italics ours.)

The Court of Appeals for the Eighth Circuit made a mistake in *Michigan Trust Co.* v. *Ferry,* 175 Fed. Rep. 667, similar to the error committed by the Court of Appeals for the Fifth Circuit in the case at bar, for the Eighth Circuit Court said, page 680:

> "• • • *because the proceeding in that court* (Michigan Probate Court) *was in rem, and the adjudication of this personal claim for debt or damages was beyond the scope of the jurisdiction of that court in that proceeding,* and because that court was without power to adjudge in that proceeding that the Trust Company as administrator de bonis non or personally should recover that debt or those damages, the order and decree of that court that the defendant was individually liable for and should pay to the Michigan Trust Company, administrator de bonis non of the estate of William M. Ferry, on account of the devastavit found—$915,355.08—was beyond its jurisdiction and void, *and an action upon it cannot be sustained in any other jurisdiction.*" (Italics ours.)

In reversing that decision, this Court, in *Michigan Trust Company* v. *Ferry,* 228 U. S. 346, 353, 354, said:

> "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. *But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not.* This is one of the decencies of civilization that no one would dispute. *It applies to Article IV, Sec. 1, of the Constitution, so that if a judicial proceed-*

ing is begun with jurisdiction over the person of the party concerned it is within the power of a State to bind him by every subsequent order in the cause. Nations *v. Johnson,* 24 How. 195, 203, 204. This is true not only of ordinary actions but of proceedings like the present. * * *

"As there can be no doubt of the power of the States to give the larger scope to an account, which indeed is not illogical in view of the fuller modern development of the notion that an executor holds all the assets in a fiduciary capacity, *the only question in any case is what the State has seen fit to do. Upon this question courts of other jurisdictions owe great deference to what the court concerned has done.* It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the Supreme Court of the State is produced, the probability is that the local procedure follows the traditions of the place. Therefore we should feel bound to assume that the Michigan decree was not too broad, in the absence of statute or decision showing that it was wrong.

"But unless and until the Supreme Court of Michigan shall decide otherwise we are of the opinion that the Probate Court was right." (Italics ours.)

Following the decision of this Court in the *Michigan* case, the United States Court of Appeals for the District of Columbia, made a similar decision in a similar situation: *Boone* v. *Wachovia Bank & Trust Co.,* 163 F. 2d 809.

The doctrine was again upheld by this Court in an opinion by Chief Justice Hughes in the case of *Leman* v. *Krentler-Arnold Co.,* 284 U. S. 448. In that case the Michigan corporation filed suit for patent infringement in the Federal District Court of Massachusetts, where the

plaintiff corporation was not doing any business. The defendant interposed a counterclaim for infringement of a patent. On the trial the Michigan corporation's complaint was dismissed and a permanent injunction granted to the defendant on its counterclaim, plus damages. The judgment for damages was paid. Fifteen months later, while the Michigan corporation was still not doing business in Massachusetts, the defendant obtained an order to show cause from the District Court in Massachusetts directing the Michigan corporation to appear and show cause why it should not be punished for contempt for violation of the permanent injunction in favor of defendant and served the order to show cause on the Michigan corporation by registered mail in Michigan; no service inside the district. The jurisdiction was contested by the Michigan corporation but was upheld by this Court.

The highest court of New York in *Leviten* v. *Sandbank*, 291 N. Y. 352, has definitely declared that an order similar to the order of November 16, 1948, involved in this case, may not be challenged or contested in any other proceeding or action:

> "The plaintiff may not now challenge the existence or amount of the lien conclusively established by the order of the Court in the earlier proceeding."

Justice Pecora, in *Roulstone* v. *Oesterreicher*, 188 Misc. 741, 742, following the above decision of the Court of Appeals of New York in *Leviten* v. *Sandbank*, very clearly stated the law of New York on the question involved here:

> "Plaintiff, an attorney, suing for fees and disbursements, makes this application for summary judgment. The relationship of attorney and client is admitted. Heretofore plaintiff in a special proceeding to have his lien fixed under section 475

> of the Judiciary Law obtained an order in his favor fixing the amount of his lien in the precise amount sued for herein. In view of that determination, there remains no triable issue in this case. * * * It was held in Matter of Winkler (154 App. Div. 532) and Matter of Roberts Electric Supply Co., Inc. (131 Misc. 119) *that once the value of attorney's services is determined in a proceeding to fix his lien, it will be conclusive upon the parties in any other subsequent proceeding or action.* (See, also, Leviten *v.* Sandbank, 291 N. Y. 352.) * * * There being no issue to be tried as to the value of the services, the motion for summary judgment is in all respects granted." (Italics ours.)

The above New York decisions, as well as decisions of this Court, were cited in the opinion of the District Court at Dallas (*Curley C. Hoffpauir* v. *Harry M. Hoxsey,* 82 F. Supp. 14), and in petitioner's brief to the Federal Court of Appeals, but were wholly ignored and disregarded by that Court.

III

Statement of Case.

The statement of the case contained in the petition under A and under JURISDICTION above is deemed sufficient for presentation of the questions involved and, in the interests of brevity, will not be repeated here.

IV

Statutes Involved.

Section 1254 (1), U. S. C. A., Title 28, page 79, provides:

> "Sec. 1254. Courts of Appeals; certiorari; appeal; certified questions.

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • •"

Section 2101(c), U. S. C. A., Title 28, provides that the application for writ of certiorari must be made within 90 days.

Section 2106, U. S. C. A., Title 28 reads as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Section 1331 defines the general jurisdiction of the District Courts of the United States; section 1332 provides for suits based on diversity of citizenship; section 1391 defines the venue of the District Courts; and section 1406(b), all U. S. C. A., Title 28, which is also listed under venue, provides:

> "(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving *a party who does not interpose timely and sufficient objection to the venue.*" (Italics ours.)

Article IV, Section 1 of the Constitution, and the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States are so well known to this Court that they need not be quoted.

Sections 474 and 475 of the New York Judiciary Law, so far as material, are quoted on pages 97 and 98 of the Record.

V

The Question Presented.

Should full faith and credit be accorded under Article IV, Section 1, of the Constitution, by courts of the United States to a final order or decree made by Federal District Court in New York on petition and adequate notice served by registered mail on respondent in Texas, determining the value of attorney's services and fixing the amounts of his attorney's liens in a pending action filed by respondent as plaintiff in which petitioner herein was attorney of record, and which said New York District Court order was based upon the statute, practice and court decisions of New York?

VI

Specification of Errors or Points Relied on for Certiorari.

The alleged errors in the decision of the United States Court of Appeals for the Fifth Circuit and the grounds on which the writ of certiorari is prayed are fully stated in the petition therefor, but for the convenience of this Court the contentions of petitioner may be here again stated with citation of some authorities.

VII

Summary of Argument

POINT A

The decision below is contrary to and in conflict with Article IV, Section 1, of the Constitution, the due process clauses of amendments V and XIV to the Constitution of the United States, and with prior Federal and State Court decisions.

Full faith and credit should be accorded by the courts of the United States to the final order or decree rendered in New York, and to the statutes and decisions of New York on which such final order is based.

(a) The District Court in New York judicially determined the value of petitioner's legal services as a necessary element in fixing the amounts of his liens, and that determination is conclusively binding on the parties in any other action or proceeding.

(b) The District Court in New York had jurisdiction of the subject matter and of the parties.

(c) The notice personally served on respondent Hoxsey was timely and adequate and complied in all respects with the due process clauses of the Constitution.

(d) The Court of Appeals was bound to interpret the order of November 16, 1948 in accordance with the scope and meaning given to similar orders by the decisions of the Courts of New York.

(e) The final order made November 16, 1948 by the District Court in New York is *res judicata* and is conclusively binding on the parties and on all courts everywhere.

(f) The respondent Hoxsey was bound by the undenied account stated and the judgment of the district court in Texas should have been affirmed on that ground.

(g) The effect of the decision of the Court of Appeals is to deprive petitioner of property without due process of law.

(h) The affirmative act of respondent Hoxsey in invoking the jurisdiction of the New York District Court gave that Court the power and jurisdiction to bind him *in personam*.

(i) The respondent's appeal from the judgment of the District Court in Texas was without substance or merit and petitioner's motion to dismiss it and/or affirm the judgment should have been granted.

POINT B

The law of New York is clear and unambiguous and is within the constitutional authority of that State.

VIII

Argument.

We approach discussion of the ground advanced for grant of writ of certiorari with full consciousness that the question at the threshold is not whether the United States Court of Appeals for the Fifth Circuit erred, but whether the case is one in which this Court will see fit, in its discretion, to exercise its undoubted power of review, if probability of error be shown. The position of this Court has been expounded in

Forsyth v. *Hammond,* 166 U. S. 506;
American Express Co. v. *Mullins,* 212 U. S. 311, 313;
Michigan Trust Co. v. *Ferry,* 228 U. S. 346.

We submit that in the case at bar, the circumstances are such as to satisfy this Court of the importance of the question involved, and that there is conflict between the Court of Appeals and the courts of a State, and conflict between the Court of Appeals and the decisions of this Court and the decisions of other courts of the United States in

Leviten v. *Sandbank,* 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher,* 188 Misc. 741, 742;
Ward v. *Craig,* 87 N. Y. 550, 561;
Citizens Bank of White Plains, N. Y. v. *Oglesby,* 270 App. Div. 136, 140;
Schuylkill Fuel Corp. v. *Nieberg Realty Corp.,* 250 N. Y. 304;
Rodkinson v. *Haecker,* 248 N. Y. 480, 485;
Lawrence v. *Commodore Nav. Corporation,* 27 F. Supp. 140;
Henderson v. *Henderson,* 247 N. Y. 428;
Commercial Casualty Ins. Co. v. *Consolidated* Stone Co., 278 U. S. 177;
Freeman v. *Bee Machine Co.,* 319 U. S. 448;
Baltimore S. S. Co. v. *Phillips,* 274 U. S. 316, 325;
Michigan Trust Co. v. *Ferry,* 228 U. S. 346;
Merchants Heat & Light Co. v. *Clow & Sons,* 204 U. S. 286, 289, 290;
Leman v. *Krentler-Arnold Co.,* 284 U. S. 448, 451;
American Express Co. v. *Mullins,* 212 U. S. 311, 313;
Fauntleroy v *Lum,* 210 U. S. 230, 236;
Forsyth v. *Hammond,* 166 U. S. 506, 514;
Williams, et al., v. *North Carolina,* 317 U. S. 287, 293, 294;
Boone v. *Wachovia Bank & Trust Co.,* 163 2d 809;

Jos. Riedel Glass Works, Inc. v. *Keegan,* 43 F. Supp. 153;
Tilghman v. *Tilghman,* 57 F. Supp. 417, 418;
Brooks v. *United States,* 119 F. 2d 636, 644;
Watkins v. *Rives,* 125 F. 2d 33, 40, 41.

It is clear that this case comes within the rule laid down in *Forsyth* v. *Hammond,* 166 U. S. 506, and the other cited decisions of this Court, but, irrespective of rule or precedent, the case discloses a denial of full faith and credit and due process so far-reaching in its consequences as to merit review of this Court.

Full faith and credit should be accorded by the Courts of the United States to the final order or decree rendered in New York and to the statutes and decisions of New York on which such final order is based.

To this general proposition there will be no dissent as applied to final judgments of state courts of general jurisdiction.

Cases supporting the full faith and credit doctrine are legion. Citation of them would be a mere parade of authorities more familiar to this Court than to us.

The final order measuring the value of petitioner's professional legal services and fixing his attorney's liens falls under the general rule. It meets every requirement of that rule, as will be noted in the following particulars:

(1) The jurisdiction of the District Court in New York of the person and subject matter.

The Court of Appeals has decided that the District Court in New York had jurisdiction, for some purposes, of the person of respondent Hoxsey as plaintiff in the action then pending in that Court and of the subject matter, and

exercised its jurisdiction of the person in the statutory way and in accord with court decisions, which was sufficient for those purposes.

We contend and shall endeavor to demonstrate in discussion under the appropriate subheads, that such jurisdiction and exercise extended to all purposes of the New York District Court final order of November 16, 1948.

(2) Finality of its order.

It was a final order. The order was appealable to the United States Court of Appeals for the Second Circuit, but respondent Hoxsey did not appeal. The order determined the value of petitioner's professional services to Hoxsey and fixed his retaining and charging liens; it directed petitioner to sign a stipulation for the voluntary dismissal of the action, without prejudice to petitioner's right to recover from Mr. Hoxsey the amount of his fees found due by that Court, because it appeared that respondent Hoxsey was financially responsible, thereby making it unnecessary for petitioner to keep the action alive, as he had a right to do; and the order severed and terminated the relationship of attorney and client. In other words, the order was final in so far as the Court of Appeals recognized the jurisdiction of the New York District Court.

(3) General jurisdiction of the New York District Court and presumption supporting its final order of November 16, 1948.

The District Court of the United States for the Southern District of New York is a court of general jurisdiction.

Section 1331, U. S. C. A., Title 28;
Section 1332, U. S. C. A., Title 28;
Section 1391, U. S. C. A., Title 28. Venue generally;
Section 1406(b), U. S. C. A., Title 28. Waiver.

A court of general jurisdiction is presumed to act rightly.

Galpin v. *Page*, 18 Wall. 350, 365;
Hanley v. *Donoughue*, 116 U. S. 1.

(4) No fraud in procurement of the final order and no conflict with record.

The answer of the respondent Hoxsey (R. 24-28) alleges that fraud was practiced on the District Court in New York to give it jurisdiction, but he produced no proof to support this wild allegation, nor do the opinions of the District Judge Atwell and the Court of Appeals suggest or find any fraud in the procurement of the final order of November 16, 1948, and no conflict with the record in that Court was made to appear in the District Court at Dallas. If there was any fraud, the respondent Hoxsey himself committed it by his connivance with the attorneys for the defendants to get the New York District Court case, in which he was the plaintiff, dismissed over the head of his own attorney, procure copies of papers on which he knew that his attorney had a lawful lien, and avoid payment of his attorney's fees (R. 107-113).

Here, then, was a final order of the New York District Court of competent jurisdiction rendered in exercise of adequate jurisdiction over the person and subject matter for some purposes, as the Court of Appeals has decided, (and, as we contend, for all purposes so far as Hoxsey's obligations to petitioner as his attorney are concerned) without fraud in the procurement, disclosing no conflict with the record, to which full faith and credit, as construed under the statutes and decisions of New York, was denied by the United States Court of Appeals for the Fifth Circuit, in the following particulars:

(a) The District Court in New York judicially determined the value of petitioner's legal services

as a necessary element in fixing the amounts of his liens, and that determination is conclusively binding on the parties in any other action or proceeding.

The New York courts recognize two kinds of attorney's liens: (1) A general, possessory lien, commonly called a retaining lien, which affords to an attorney the right to retain all papers and property of his client in his possession, until his entire claim for services has been discharged; and (2) a particular lien upon a specific fund or judgment, or cause of action, and which is denominated a charging lien. This latter lien has now become statutory in New York by Section 475 of the Judiciary Law.

Robinson v. *Rogers,* 237 N. Y. 470;
Goodrich v. *McDonald,* 11 N. Y. 157, 162, 163;
Matter of Heinsheimer, 214 N. Y. 361, 364;
Matter of Rieser, 137 App. Div. 177, 185, 186;
Matter of Sebring, 238 App. Div. 281, 285-286;
Simon v. *Burke,* 190 Misc. 618.

The attorney's retaining lien extends to a general balance of account for professional services, and such services are not confined merely to a litigation which terminates in a technical judgment.

Rooney v. *Second Ave. R. R. Co.,* 18 N. Y. 368;
Matter of Roberts Electric Supply Co., Inc., 131 Misc. 119.

"An attorney's lien is to be admeasured by the value of his services."

Ward v. *Craig,* 87 N. Y.

Therefore, the value of petitioner's services, as determined by the District Court order of November 16, 1948,

is conclusive upon the respondent Hoxsey in the District Court action in Dallas.

Sandbank v. *Leviten*, 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher*, 188 Misc. 741, 742;
Matter of Winkler, 154 App. Div. 532, 535, 536;
Matter of Roberts Electric Supply Co., Inc., 131 Misc. 119.

(b) The District Court in New York had jurisdiction of the subject matter and of the parties.

Section 1331, U. S. C. A., Title 28, prescribes the general jurisdiction of District Courts of the United States; Section 1332, U. S. C. A., Title 28, defines that jurisdiction where diversity of citizenship is involved; Section 1391, U. S. C. A., Title 28, defines the venue generally of the District Courts; and Section 1406(b) of the same Title provides that if objection to the venue is not timely made, it is waived.

There is no longer any doubt that the District Courts of the United States are courts of general jurisdiction and that they have the authority to hear and determine the value of attorneys' services and fix the amounts of their liens in actions over which these Courts have acquired jurisdiction. Consequently, the District Court, sitting in New York in a diversity of citizenship case, had jurisdiction over the subject of petitioner's attorney's fees and liens, to be exercised in accordance with the laws of New York.

In re Baxter & Co., 154 Fed. 22;
In re Paschal, 10 Wall. 483, 493;
Central Railroad v. *Pettus*, 113 U. S. 116, 127;
Webster v. *Sweat*, 65 F. 2d 109;
Brooks v. *Mandel-Witte Co.*, 54 F. 2d 992, 994;
Lawrence v. *Commodore Nav. Corporation*, 27 F. Supp. 139.

The respondent Hoxsey voluntarily invoked the jurisdiction of the New York District Court over his own person and the subject matter of his action and his obligations to his attorney of record in that action. The formal appearance of his attorney in that action was notice to Hoxsey of his attorney's liens and the power and jurisdiction of the District Court to determine the value of his attorney's services and fix the amounts of his attorney's liens. The jurisdiction of the District Court in New York thus invoked voluntarily by the respondent Hoxsey over his own person, continued for all lawful purposes until the dismissal of that action.

Leman v. *Krentler-Arnold Co.*, 284 U. S. 448;
Michigan Trust Co. v. *Ferry*, 228 U. S. 346;
Merchants Heat & Light Co. v. *Clow & Sons*, 204 U. S. 286;
Boone v. *Wachovia Bank & Trust Co.*, 163 F. 2d 809;
Jos. Riedel Glass Works, Inc. v. *Keegan*, 43 F. Supp. 153;
Tilghman v. *Tilghman*, 57 F. Supp. 417, 418;
Lenetska v. *Goldstein*, 192 Misc. 929;
Montgomery v. *East Ridgelawn Cemetery*, 182 Misc. 562;
Farmer v. *The National Life Ass'n, etc.* 138 N. Y. 265;
Henderson v. *Henderson*, 247 N. Y. 428, 432;
Hilton v. *Guyol*, 159 U. S. 113;
Huntington v. *Attrill*, 146 U. S. 657;
Atherton v. *Atherton*, 181 U. S. 155.

If the respondent Hoxsey ever had any right to object to the venue of the District Court in New York, which we

deny, he certainly waived it by his conduct, for the District Court in Texas found as a fact that:

> "The effort to secure further payments on that fee after the defendant had asked for a dismissal of his suit, resulted in an order, heretofore referred to, issued out of the New York court *which was served upon the defendant and to which he made no response, nor objection, nor defense.* The New York Court thereupon heard testimony in accordance with the notice and motion and determined the amount due and fixed the lien." (Italics ours)

See Rule 52(a) of the Federal Rules of Civil Procedure;
Section 1406(b), U. S. C. A., Title 28;
Commercial Co. v. *Consolidated Co.*, 278 U. S. 177;
Freeman v. *Bee Machine Co.*, 319 U. S. 448;
Industrial Addition Association v. *Commissioner of Internal Revenue*, 323 U. S. 310, 313;
Senitha v. *Robertson*, 45 F. 2d 51;
Clover Leaf Freight Lines, Inc. v. *Pacific Coast Wholesalers Association*, 166 F. 2d 626.

With all the facts before it, the Federal District Court in New York decided that it had jurisdiction over the respondent Hoxsey and to determine the value of petitioner's services and to fix his attorney's liens. Therefore, he is bound by such determination and may not impeach it in another court.

(c) The notice personally served on respondent Hoxsey was timely and adequate and complied in all respects with the due process clauses of the Constitution.

Due cognizance should be taken of the force and effect of the notice and motion papers, duly served upon

respondent Hoxsey personally by registered mail and acknowledged over his personal signature, fixing the date for the determination of the value and amount of the fees of his attorney of record and the extent of his attorney's liens, and for a direction of the Court relieving the attorney from any further duty as Hoxsey's attorney.

The rendition of the final order of November 16, 1948 by the New York District Court was not an attempt to nor did it in fact deprive respondent Hoxsey of property without due process of law.

Due process of law must give to the respondent "notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained."

In re Rosser, 101 Fed. 562, 567;
In re Wood and Henderson, 210 U. S. 246, 254.

The notice and motion papers served upon the respondent in the proceedings in the New York District Court action complied in all respects with the above rule. The petition to determine the value of the attorney's services and the amounts of his liens was summary in character and did not require the issuance of any original or additional process, as this had already been done when Hoxsey filed the action. Therefore, service of the notice and motion papers on the plaintiff Hoxsey by registered mail in Texas, under Rule 5(b) of the Federal Rules of Civil Procedure, was sufficient and constituted due process.

In re Wood and Henderson, 210 U. S. 246, 254;
Lawrence v. *Commodore Nav. Corporation,* 27 F. Supp. 139;

Jos. Riedel Glass Works, Inc. v. *Keegan,* 43 F. Supp. 153;
Tilghman v. *Tilghman,* 57 F. Supp. 417, 418;
Brooks v. *United States,* 119 F. 2d 636, 644;
Watkins v. *Rives,* 125 F. 2d 33, 40, 41.

It is true that the New York court order of November 16, 1948 could not be enforced or an action brought on it in New York while respondent Hoxsey remained out of the State, but this has nothing to do with the validity of that final order and the full faith and credit to which it is entitled under the Constitution and statutes of the United States.

As said by Mr. Justice Holmes, in *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, 356:

> "The judgment of a court 'may be complete and perfect and have full effect independent of the right to issue execution.' *Mills* v. *Duryee,* 7 Cranch 481, 485. See *Kimball* v. *St. Louis & San Francisco Ry. Co.,* 157 Massachusetts 7, 8."

The Court of Appeals for the Eighth Circuit made a mistake in the *Michigan Trust* case similar to the mistake made by the Court of Appeals in the case at bar, for it said, 175 Fed. Rep. 667, at page 680:

> "• • • because the proceeding in that court *was in rem,* and the adjudication of this personal claim for debt or damages was beyond the scope of the jurisdiction of that court in that proceeding, • • •" (Italics ours.)

This determination was reversed by this Court.

Michigan Trust Co. v. *Ferry,* 228 U. S. 346.

The efficacy of constructive or substituted service is by no means confined to actions or proceedings *in rem,* as the

Court of Appeals would seem to imply by classing as such the New York District Court proceeding.

In re Wood and Henderson, 210 U. S. 246, 254.

Nor is such efficacy affected by the possibility that the action or proceeding *in personam* may result in a judgment for money.

Lafayette Ins. Co. v. *French,* 59 U. S. 404;
Mutual Reserve Co. v. *Phelps,* 190 U. S. 147.

No such distinction is attempted in the qualifying clause beginning,

"Neither do we mean to assert," etc. on page 735 of

Pennoyer v. *Neff,* 95 U. S. 714.

The substituted service in

Vallee v. *Dumergue,* 4 Exch. 290,

approved in the *Pennoyer* case, and

Copin v. *Adamson,* 1 Exch. 17,

approved in

Wilson v. *Seligman,* 144 U. S. 41

suffice to sustain decrees tending to deprivation of property in as true a sense as does the New York District Court final order of November 16, 1948.

(d) The Court of Appeals was bound to interpret the order of November 16, 1948 in accordance with the scope and meaning given to similar orders by the decisions of the courts of New York.

This statement would appear almost axiomatic were it not for the conclusions which the Court of Appeals reached,

based upon the erroneous impression that because the petition and order respecting the fixing of the amounts of petitioner's attorney's liens were in the nature of a proceeding *in rem*, that the order made could have no binding effect on Hoxsey in an action *in personam* in another jurisdiction, notwithstanding the fact that the District Court in New York had jurisdiction over Hoxsey's person, which he had voluntarily conferred, and that due, adequate and reasonable notice was given to Hoxsey of the application for such order and the facts on which the application was based, not only at that time but by letter from his attorney prior to making said motion (R. 48-51, 60-113).

The test laid down by this Court is: Would the order of November 16, 1948 have been treated as conclusively binding on Hoxsey and his attorney by the courts of the State of New York, if Mr. Hoxsey had been served and sued in the Supreme Court of New York instead of the District Court at Dallas, Texas?

Forsyth v. *Hammond*, 166 U. S. 506;
American Express Co. v. *Mullins*, 212 U. S. 311, 313;
Michigan Trust Co v. *Ferry*, 228 U. S. 346;
Fauntleroy v. *Lum*, 210 U. S. 230;
Williams, et al. v. *North Carolina*, 317 U. S. 287.

The answer is, of course, that the highest court of New York had decided that such orders were conclusively binding on the parties in all subsequent actions or proceedings. In New York, a motion for summary judgment would have been granted on the ground that there was no triable issue.

Sandbank v. *Leviten*, 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher*, 188 Misc. 741, 742.

The order being so recognized as conclusively binding by the courts of New York, Article IV, Section 1, of the Constitution requires that it be so recognized by all courts of the United States, State and Federal.

(e) The final order made November 16, 1948 by the District Court in New York is *res judicata* and is conclusively binding on the parties and on all courts everywhere.

The issues of fact and law, as disclosed by the Record before this Court, which were presented in the action to the District Court in Texas and to the Court of Appeals, were identical with the issues of fact and law which were presented to and determined finally by the District Court in New York, by its order dated November 16, 1948, made after due notice to the respondent. There was no issue of fact to be tried and your petitioner was entitled to judgment as a matter of law, and this is what the District Court at Dallas decided (R. 150; *Hoffpauir* v. *Hoxsey,* 82 F. Supp. 14). The District Court in New York having determined and decided that it had jurisdiction of the subject matter and of the parties, and having determined the value of petitioner's professional services for the purpose of fixing the amounts of his liens, its order of November 16, 1948 is *res judicata* and is conclusively binding on respondent Hoxsey in the action which petitioner filed in the District Court at Dallas, Texas.

Leviten v. *Sandbank,* 291 N. Y. 352, 358;
Roulstone v. *Oesterreicher,* 188 Misc. 741, 742;
Matter of Winkler, 154 App. Div. 532, 535, 536;
Young v. *Farwell,* 165 N. Y. 341;
Schuylkill Fuel Corp. v. *Nieberg Realty Corp.,* 250 N. Y. 304;

Baltimore S. S. Co. v. *Phillips,* 274 U. S. 316, 325;
Good Health Dairy Products Corp. v. *Emery,* 275 N. Y. 14, 18;
Furman v. *Furman,* 172 Misc. 582, 585;
Forsyth v. *Hammond,* 166 U. S. 506;
Michigan Trust Co. v. *Ferry,* 228 U. S. 346;
34 Corpus Juris 743;

And an order or judgment entered by default is just as binding as any other order or judgment.

Gates v. *Preston,* 41 N. Y. 113;
Wershor v. *Wershor,* 130 Misc. 262, 263;
Goebel v. *Iffla,* 111 N. Y. 170;
Jasper v. *Rozinski,* 228 N. Y. 349, 357;
Slots v. *Cascade Holding Corp.,* 276 N. Y. 239;
Stradley v. *Bates Portland Cement Co.,* 228 Pa. 108;
Lamon v. *Rodgers,* 42 Pa. Super. 437;
Last Chance Mining Co. v. *Tyler Mining Co.,* 157 U. S. 683;
Third National Bank v. *Atlantic City,* 130 Fed. 751;
Reid v. *Holmes,* 127 Mass. 326;
Jarvis v. *Driggs,* 69 N. Y. 143.

In *Last Chance Mining Co.* v. *Tyler Mining Co., supra,* this Court said, page 691:

> "It is said the defendants did not contest; that they withdrew their answer, and that there was only a judgment by default. But a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest."

The form of the action or proceeding is not material; the fact that petitioner's rights were established by order and not in the form of a judgment does not alter the application of the *res judicata* doctrine.

Schuylkill Fuel Corp. v. *Nieberg Realty Corp.*, 250 N. Y. 304, 305, 306;
Furman v. *Furman*, 178 Misc. 582, 585;
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316, 325;
Forsyth v. *Hammond*, 166 U. S. 506.

The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.

American Surety Co. v. *Baldwin, et al.*, 287 U. S. 156, 166;
Stole v. *Gottlieb*, 305 U. S. 165, 172;
Ripperger v. *A. C. Allyn & Co.*, 37 F. Supp. 373.

The Federal District Court at New York was in possession of all jurisdictional facts; no facts were withheld from that Court. With all the facts before it, the Court decided that it had jurisdiction of the subject matter and of the parties. That Court's decision is not subject to collateral attack. The only remedy available to the party aggrieved was an appeal to the United States Court of Appeals for the Second Circuit.

Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316, 325.

(f) The respondent Hoxsey was bound by the undenied account stated and the judgment of the district court in Texas should have been affirmed on that ground.

Paragraphs seventh and eighth of the complaint allege that a series of statements of account were sent by

petitioner to respondent via airmail special delivery, commencing November 11, 1947 and the last one August 2, 1948, "showing the amount due to plaintiff from the defendant for professional services rendered and disbursements made and demanded payment thereof, and the defendant Harry M. Hoxsey received and retained all such statements of account without objection as to their correctness." Under the New York law, these allegations made out an account stated just as effectively as if one had been drawn up and signed by the respondent Hoxsey (R. 9, 100, 101). The unverified answer does not deny paragraphs seventh and eighth of the complaint (24-28). They must, therefore, be deemed admitted.

Rodkinson v. *Haecker,* 248 N. Y. 480, 485;
Corr v. *Hoffman,* 256 N. Y. 254;
Matter of Sasson, 231 App. Div. 524, 527;
Audley v. *Jester,* 148 App. Div. 94, aff'd 212 N. Y. 573.

There is a presumption of fact that a letter put into the postoffice and properly addressed, is received by the person to whom it is addressed.

Rosenthal v. *Walker,* 111 U. S. 185;
Atherton v. *Atherton,* 181 U. S. 155, 171.

The judgment of the District Court in Texas should be affirmed on the basis of the account stated which is pleaded by petitioner but is not denied by the respondent.

(g) The effect of the decision of the Court of Appeals is to deprive petitioner of property without due process of law.

This Court has held that a refusal to give full faith and credit to the judicial proceedings of another State under

Article IV, Section 1 of the Constitution of the United States amounts to a denial of due process under the Fourteenth Amendment to the Constitution.

In *Caterpillar Tractor Co.* v. *International Harvester Co.*, 120 F. 2d 82, it was held that a judgment rendered by a federal court is entitled to the same faith and credit in another federal court as one rendered by the court of the state where it is sitting although the constitutional mandate of full faith and credit is applicable to states only. The court said:

> "On the other hand, the matter here is one between two courts of the same sovereignty, the United States of America. *If one federal court failed to give effect to the judgment of another federal court the Supreme Court of the United States, as head of the judicial system, of the United States, would compel it do so because 'they are many members yet but one body.'* " (Italics ours).
>
> *American Express Co.* v. *Mullins*, 212 U. S. 311.

(h) The affirmative act of respondent Hoxsey in invoking the jurisdiction of the New York District Court gave that Court the power and jurisdiction to bind him *in personam.*

This proposition is made obvious by the decisions of this Court in *Leman* v. *Krentler-Arnold Co.*, 284 U. S. 448, and *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346 and no further discussion of the point is required.

(i) The respondent's appeal from the judgment of the District Court in Texas was without substance or merit and petitioner's motion to dismiss it and/or affirm the judgment should have been granted.

The respondent's statement of points (R. 159) to the Court of Appeals, in the light of the decisions of this Court

and the decisions of the courts of New York, presented no substantial question for review; his appeal was entirely without merit and should have been dismissed and/or the judgment of the District Court affirmed.

Michigan Trust Co. v. *Ferry,* 228 U. S. 346;
American Express Co. v. *Mullins,* 212 U. S. 311;
Baltimore S. S. Co. v. *Phillips,* 274 U S. 316;
Schuylkill Fuel Corp. v. *Nieberg Realty Corp.* 250 N. Y. 304;
Leviten v. *Sandbank,* 291 N. Y. 352;
Roulstone v. *Oesterreicher,* 188 Misc. 741, 742;
Robertson v. *Wilkinson,* 10 F. 2d 311;
Brown v. *Carver,* 45 F. 2d 673;
Colorado Radio Corporation v. *Federal Communications Commission,* 118 F. 2d 24;
National Surety Co. v. *Universal Transp. Co.,* 256 F. 450;
Micas v. *Williams,* 104 U. S. 556.

It is respectfully submitted that the alleged questions presented by the respondent to the Court of Appeals were frivolous and completely devoid of any merit and said appeal was taken only for the purpose of delay and the harassment of your petitioner, and it should have been dismissed and/or the judgment affirmed.

POINT B

The law of New York is clear and unambiguous and is within the constitutional authority of that State.

This point has been made clear by the preceding discussion, which need not be repeated here.

Conclusion

For the reasons and upon the authorities collated in the petition and in this brief under POINTS A and B, inclusive, it is respectfully submitted that the decision of the learned Court of Appeals was wrong and that of the District Court at Dallas was right. That the New York District Court had jurisdiction over Hoxsey and to fix his liability to his attorney of record has been demonstrated.

As adjudicating an individual liability the final order of the New York Court was properly received in evidence by the District Court at Dallas *as conclusively binding on the respondent Hoxsey and foreclosed him from making a collateral attack on that order in that Court.*

We submit that, in any event, the opinion below should be reviewed and brought into harmony with the statutes and decisions of New York, as they are herein set forth, and particularly with regard to the scope and effect of the final order entered in respondent Hoxsey's action in New York on November 16, 1948. That the New York District Court had jurisdiction over Harry M. Hoxsey and of the subject matter to some extent is recognized by the Court of Appeals. *Where can the line of demarcation be drawn in the New York order? What parts of it are binding upon other courts and what parts are not?* These are questions which are proper subjects for determination by this Court.

The Court of Appeals in its opinion says of the New York District Court's jurisdiction:

> "We have no doubt that under the well established rule that one who subjects himself to the jurisdiction of a Court, even where he would not otherwise be subject to suit, becomes subject to any valid claim asserted against him directly relating to the subject matter of his voluntarily initiated proceeding. *We do not doubt therefore that by his employment of*

counsel and the institution of suit in the Court in New York the appellant became subject to the statutes of New York regulating and controlling the attorney-client relationship with reference to the fixing and enforcing of the respective rights between the parties."

And thereafter, in the last paragraph of the opinion, it is said:

> *"In the Texas suit the burden was upon the complainant to establish his right to recover independently of the New York proceeding.* For this reason, it was error for the trial Court to give conclusive effect to the order of the New York Court instead of requiring the complainant to establish his case by competent evidence. The judgment is reversed and a new trial ordered on count one of the complaint." (Italics ours.)

It is respectfully submitted that the patent ambiguity presented by these two statements should be rectified.

It needs no demonstration that if this opinion is to stand uncorrected the resulting conflict between federal courts and federal and state jurisprudence will prove of great public import, in that it will impede the course of justice and make any State of the Union which follows this opinion an asylum of refuge for the dishonest litigants of other States, despite the law in force in the State where the action was filed, the attorney employed, and the attorney's services performed.

We respectfully urge that the reasons for review by writ of certiorari, as set out in the petition for that writ, are amply sustained by the record and the argument.

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